86-852

No.

Supreme Court, U.S.
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CLERK

SUPREME COURT OF THE UNITED STATES

October Term, 1986

J. VINCENT APRILE, II and
JULIE NAMKIN - - - - - Petitioners

versus

COMMONWEALTH OF KENTUCKY - Respondent

Petition for Certiorari to the Supreme Court of Kentucky

PETITION FOR WRIT OF CERTIORARI

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I. QUESTION PRESENTED FOR REVIEW

Whether the Supreme Court of Kentucky may, consistent with due process, find appointed public advocate attorneys, handling a mandatory death penalty appeal, guilty of criminal contempt and impose fines on a vote of 4-3 without making specific findings of fact and conclusions of law or specifying the elements of the offense and the standard of proof applied.

Petitioners contend that the Court should issue this writ to answer this question in the negative.

II. LIST OF ALL PARTIES TO THE PROCEEDING IN THE SUPREME COURT OF KENTUCKY

In the Supreme Court of Kentucky, this action was styled *Parramore Lee Sanborn* v. *Commonwealth of Kentucky,* No. 85-SC-566-MR. Aprile and Namkin, Petitioners herein, were the public advocate attorneys representing appellant Sanborn in the appeal of his death sentence.

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COMMONWEALTH OF KENTUCKY - - *Respondent*

PETITION FOR WRIT OF CERTIORARI TO THE
SUPREME COURT OF KENTUCKY

PETITION FOR WRIT OF CERTIORARI

V. OPINIONS BELOW

The opinion of the Supreme Court of Kentucky is printed in the Petitioners' Appendix A at Pages 1a-7a and appears at 715 S. W. 2d 475. The order modifying the opinion is printed in the Petitoners' Appendix B at Page 9a and has not been officially published. The order denying Petitioners' motion for reconsideration is printed in Appendix B at Page 8a. The order denying Petitioners' motion to vacate is printed in Appendix C at Page 10a.

VI. JURISDICTION

The date of entry of the judgment sought to be reviewed is September 25, 1986. This Court has jurisdiction to hear the case under the provisions of 28 U.S.C. § 1254(1).

VII. CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS

This case involves the following constitutional provisions, statutes and court rules which are set out verbatim:

Fourteenth Amendment to the Constitution of the United States § 1:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Kentucky Rules of Civil Procedure, Rule 52.01:

> In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specifically and state separately its conclusions of law thereon and render an appropriate judgment; and in granting or refusing temporary injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review except as provided in Rule 52.04. Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses.

> The findings of a commissioner, to the extent that the court adopts them, shall be considered as the findings of the court. If an opinion or memorandum of decision is filed, it will be sufficient if the findings of fact and conclusions of law appear therein. Findings of fact and conclusions of law are unnecessary on decisions of motions under Rules 12 or 56 or any other motion except as provided in Rule 41.02.

Kentucky Rules of Criminal Procedure, Rule 9.26 (2):

> In a case tried without a jury the court shall make a general finding and shall in addition, on request made before the general finding, find the facts specially. Such findings may be oral. If an opinion or memorandum of decision is filed, it will be sufficient if the findings of fact appear in it.

VIII. STATEMENT OF THE CASE

This case arises from two public advocate attorneys' representation of an indigent defendant in his death sentence appeal. In this case, the Supreme Court of Kentucky, four members concurring and three members dissenting, found the attorneys guilty of criminal contempt for failure to show cause why their brief was not timely filed. Petitioners' client, Parramore Lee Sanborn, was convicted of murder, kidnapping, rape and sodomy charges and sentenced to death. Under Kentucky law, death sentences are subject to mandatory review (Kentucky Revised Statutes, Chap-

ther 532). Petitioners J. Vincent Aprile and Julie Namkin were the attorneys in charge of Sanborn's appeal. Aprile is General Counsel for the Kentucky Department of Public Advocacy and Namkin is a member of the staff.

By order of August 30, 1985, the Supreme Court of Kentucky granted Petitioners an extension of time to and including June 2, 1986 in which to perfect the appeal and file the brief on behalf of Sanborn. The court provided that if Sanborn's brief was not filed and his appeal perfected before June 2, Petitioners must appear before the court "to show cause why they should not be held in contempt of this Court or sanctioned, for failure to timely complete the brief" (Appendix A, pp. 1a-7a).

Aprile and Namkin were unable to comply with this order. After filing a timely motion for extension of time, on June 24, 1986, they appeared before the Supreme Court of Kentucky and offered explanation. The transcript in this case is unusually long, over 10,000 pages. Namkin explained that she is assigned two case appeals each month to handle and she cannot prepare a death penalty brief in the 80 work hours available in a two week period. During the period of time included she exceeded her allowed overtime hours and was not being paid for some of the work she was doing. Aprile is not even assigned to the appellate section of the Department of Public Advocacy—in addition to his regular duties as General Counsel, he accepts appellate work due to the overload of his staff.

On June 25, the Supreme Court of Kentucky granted an extension of time to and including November 2, 1986, in order to file Sanborn's brief (Appendix A, pp. 1a-7a).

By Opinion and Order of August 7, 1986, however, the Supreme Court found Aprile and Namkin in criminal contempt by a vote of 5-2. Justices Stephens, Leibson, Stephenson, Vance and Wintersheimer concurred. Aprile was fined $500 and Namkin fined $250. The fines were suspended, but costs were assessed against the attorneys (Appendix A, pp. 1a-7a).

Justice Gant filed a separate dissenting opinion joined by Justice White, finding that Petitioners more than adequately showed cause why the brief was not filed. Noting that the revival of the death penalty caused a tremendous increase in responsibility for public advocates without an increase in staff, Justice Gant stated that "[t]he public defender has no control over his case load, the gravity of his cases, or the number of attorneys available for assignment, and is unable to refuse to accept one case while another is pending." Further, the dissent recognized that "[t]o expect absolute accuracy in estimating the preparation time for a case of this magnitude upon a 30-day examination of thousands of pages of transcript is patently unfair when the circumstances of underpaid, highly motivated attorneys are considered." (Appendix A, pp. 6a-7a).

On August 18, 1986, Aprile and Namkin filed a motion for reconsideration, arguing that their due process rights were violated by the court's opinion and

order. On September 25, 1986, the Supreme Court of Kentucky denied the motion for reconsideration but modified the earlier Opinion and Order. After modification, the vote for contempt was 4-3. Justice Vance would now impose sanctions, but would not find contempt (Appendix B, pp. 8a-9a).

Aprile and Namkin filed a motion to vacate the finding of contempt of court because there was no adequate basis to sustain the convictions of criminal contempt. Aprile and Namkin argued that the order was fundamentally unfair and violative of due process because it failed to specify the elements of the offense, failed to make specific findings of facts and conclusions of law and failed to specify the standard of proof. Further, Aprile and Namkin argued that the 4-3 finding of contempt did not satisfy the constitutional requirement of finding of guilt beyond a reasonable doubt. This motion was denied by order of October 31, 1986 (Appendix C, p. 10a).

IX. ARGUMENT

In the case here presented, special circumstances exist which constitute important reasons for review on a writ of certiorari. Among those circumstances are the following:

I. The decision of the Supreme Court of Kentucky finding these public advocate attorneys in criminal contempt conflicts with the applicable decisions of this Court as enunciated in *Brown* v. *Louisiana*, 447 U. S. 323 (1980) and other cases.

II. This case presents constitutional questions of importance left open by *Evitts* v. *Lucey,* 469 U. S. 387 (1985).

The Supreme Court of Kentucky found Aprile and Namkin, public advocate attorneys, guilty of criminal contempt and imposed fines for their failure to adequately show cause why their brief could not be filed within the time allotted by the court. Assuming that the proper standard of proof — beyond a reasonable doubt — was applied, a vote of 4-3 simply does not reflect the careful consideration necessary for a finding of criminal contempt.

Aprile and Namkin contend that the standard of proof beyond a reasonable doubt is not satisfied in this case because only four of the seven justices found that they were guilty of contempt. Justices Stephens, Leibson, Stephenson and Wintersheimer found that Aprile and Namkin were guilty of criminal contempt. Justice Vance believed that sanctions were warranted, but would not find the attorneys in contempt. Justices Gant and White dissented. The role of the Kentucky Supreme Court in this case is analogous to that of a jury acting as initial fact-finder in a criminal trial. It is true that unanimous verdicts are not constitutionally required in all state criminal trials. A 4-3 verdict, however, does not satisfy the requirement of a finding of guilt beyond a reasonable doubt.

In *Apodaca* v. *Oregon,* 406 U. S. 404 (1972) and *Johnson* v. *Louisiana,* 406 U. S. 356 (1972), this Court held that jury verdicts of 11-1, 10-2 and 9-3 were not

automatically invalidated. In his *Johnson* concurrence, however, Justice Blackmun expressed the view that verdicts of less than a substantial majority might not withstand attack. Justice Blackmun stated: "I do not hesitate to say, either, that a system employing a 7-5 standard, rather than a 9-3 or a 75% minimum, would afford me great difficulty." *Johnson* v. *Louisiana,* 406 U. S. at 366. In *Burch* v. *Louisiana,* 441 U. S. 130 (1979), the Court joined in Justice Blackmun's concern about less than unanimous verdicts involving smaller numbers of jurors. In *Burch,* the Court held that conviction by a nonunanimous six-person jury in a state criminal trial violates the accused's right to trial by jury as guaranteed by the sixth and fourteenth amendments.

In *Brown* v. *Louisiana,* 447 U. S. 323 (1980), this Court cataloged the reasons for its earlier holdings on this issue. Several of the considerations cited apply in this case. First, "a decline in jury size leads to less accurate fact finding and a greater risk of convicting an innocent person." *Brown,* 447 U. S. at 333. Further, a reduction in the size of the jury panel in criminal cases unfairly disadvantages one side—the defendant." *Id.*

"[T]he critical inquiry on review of the sufficiency of the evidence to support a criminal conviction must be . . . to determine whether the record evidence could reasonably support a finding of guilt beyond a reasonable doubt." *Jackson* v. *Virginia,* 443 U. S. 307, 319 (1979). The bare majority vote of 4-3 by an appellate

court serving as initial fact-finder on the question of an attorney's guilt on a contempt charge demonstrates a constitutional deficiency.

Criminal contempt is defined by Kentucky law as an act in disrespect of the court or its process which obstructs the administration of justice. *Casteel* v. *Sparks,* 312 Ky. 99, 226 S. W. 2d 533 (1950). The standard applied in determining whether an attorney is in contempt is whether he is in reckless or willful disregard of a court order. *United States* v. *Delahanty,* 488 F. 2d 396 (6th Cir. 1973). The facts of this case do not suggest that these public advocates were in reckless or willful disregard of the court's earlier order. The Supreme Court of Kentucky may properly be upset with the delays which took place in this case, but contempt of court is not the appropriate way to deal with these problems. A court should take great care before imposing that method of discipline, *Miller* v. *Stephenson,* 474 S. W. 2d 372 (Ky. 1971), in part because the impact upon the professional standing of a lawyer created by a citation for contempt of court is not limited to the monetary amount of the fine imposed.

The elements of the crime of contempt are not set forth in the court's opinion and order. Nor were Aprile and Namkin apprised before the time that they were found guilty of contempt what actions on their part would subject them to charges of contempt. Aprile and Namkin contend that their due process rights were violated because they were given no standards by which to attempt to conform their conduct. The court's earlier order granting their extension provided that

if the attorneys did not file the brief and perfect the appeal within a certain time they were to appear before the court "in order to show cause why they should not be held in contempt . . . or sanctioned, for failure to timely complete the brief." This language represents the only guidance Aprile and Namkin were given with respect to the type of behavior which would lead to contempt charges.

Aprile and Namkin contend that the vagueness of this order, giving them no standards by which to attempt to conform their conduct, violated their due process rights. Laws are frequently struck down for being overly vague:

> It is a basic principle of due process that an enactment is void for vagueness if its prohibition is not clearly defined. Vague laws offend several important values. First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning.

Grayned v. *Rockford,* 408 U. S. 104, 108 (1972). *See also United States* v. *Harriss,* 347 U. S. 612 (1954). The rules as to vagueness also apply to orders of court. *McCreery* v. *Libby-Owens-Ford Glass Co.,* 363 Ill. 321, 2 N. E. 2d 290 (1936). Aprile and Namkin were given no indication what would constitute cause sufficient to prevent their being held in contempt if they were un-

able to file the brief in the time provided. This lack of standards violated the attorneys' due process rights.

The court's opinion and order includes no specific findings of fact or conclusions of law. This is a violation of the court's own rules and goes against the weight of authority holding that findings of fact and conclusions of law are essential in criminal contempt cases. It was violative of Aprile's and Namkin's due process rights for the Supreme Court of Kentucky to fail to specifically identify those acts which constituted criminally contemptuous conduct.

The Kentucky Rules of Civil Procedure require that "[i]n all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specifically and state separately its conclusions of law thereon. . . ." CR 52.01. This rule is mandatory and failure of a trial court to honor it may constitute reversible error. *Perry* v. *McLemore,* 414 S. W. 2d 141 (Ky. 1967); *Fleming* v. *Rife,* 328 S. W. 2d 151 (Ky. 1959); *Schaaf* v. *Brown,* 304 Ky. 466, 200 S. W. 2d 909 (1947). The Kentucky Rules of Criminal Procedure contain a similar provision. *See* RCr 9.26(2). The opinion and order in this case contains no such specific findings of facts. The failure of the Supreme Court of Kentucky to follow its own rules is fundamentally unfair and constitutes a due process violation.

Although the issue has not been specifically addressed in Kentucky, there is considerable authority in other jurisdictions that specific findings of fact are essential to support a judgment for contempt. *See, e.g., Fienup* v. *Rentto,* 74 S. D. 329, 52 N. W. 2d 486, 489

(1952) ("A disregard of this rule is not a mere irregularity in practice. It is a vital defect; the Court has no right to adjudge a party in contempt without making findings of facts showing as a matter of law, a basis for the judgment."); *Hildebrand* v. *Hildebrand,* 32 Wash. 2d 311, 201 P. 2d 213, 215 (1949) ("[F]indings of fact must be made by the trial Court in either civil or criminal contempt cases.").

Furthermore, the Supreme Court of Kentucky did not identify the standard of proof applied in this case—whether the standard applied was beyond a reasonable doubt or clear and convincing or some other standard, is not made clear. The applicable standard of proof in criminal contempt cases is beyond a reasonable doubt. As this Court stated, "[w]ithout deciding what may be the rule in civil contempt, it is certain that in proceedings for criminal contempt the defendant is presumed to be innocent, he must be proved guilty beyond a reasonable doubt, and cannot be compelled to testify against himself." *Gompers* v. *Bucks Stove & Range Co.,* 221 U. S. 418 (1911). *See also Michaelson* v. *United States,* 266 U. S. 42 (1924); *Blackard* v. *State,* 217 Ark. 661, 232 S. W. 2d 977 (1950); *Brannon* v. *Commonwealth,* 162 Ky. 350, 172 S. W. 703 (1915).

Petitioner Aprile is a dedicated, experienced and effective public advocate. The records of this Court demonstrate that he has argued cases before this Court on four occasions, most recently on October 14, 1986. As noted by the Kentucky Supreme Court, as a public advocate he does not have the luxury of declining cases (Appendix A, pp. 1a-7a). The record before the Ken-

tucky Supreme Court does not demonstrate any indication of laziness, procrastination or sloth on his part. Indeed, it indicates that he and Petitioner Namkin work overtime hours for which they are not paid by reason of the budget restrictions.

In *Evitts* v. *Lucey,* 469 U. S. 387 (1985), this Court held that because due process guarantees that a criminal defendant receive effective assistance of counsel on his first appeal as of right, a mandatory appeal cannot be dismissed because counsel disobeys court rules. Justice Brennan suggested that "[t]o the extent that a state believes its procedural rules are in jeopardy, numerous courses remain open. For example, a State may certainly enforce a vital procedural rule by imposing sanctions against the attorney, rather than against the client." *Id.* at —, 105 S. Ct. at 837. If, however, because of the fear of criminal contempt charges, counsel are forced to file briefs without adequate time to properly prepare them, a chilling effect upon the quality of legal representation may occur. Such a result is surely not what was intended by Justice Brennan's comment.

The real source of the problem is the burden of overload upon the public advocates. During the period of time involved in this case, Petitioners were under three additional show cause orders from the Supreme Court of Kentucky. Aprile and Namkin were each able to comply with one order, but Aprile did not manage to comply in a third case. If sanctions are necessary, some method other than contempt of court should

be adopted to draw the attention of practitioners generally to the problems of extended delays in filing appellate briefs and in waiting until the last minute to make motions for extensions of time. Aprile and Namkin, however, believe that due process requires that they be given prior notice that last minute motions will be considered contemptuous.

X. CONCLUSION

There is insufficient weight in a 4-3 decision to support a finding of guilt beyond a reasonable doubt. Further, it is fundamentally unfair and violative of due process to be subject to an order which does not specify the elements of the offense and the standard of proof applied or make specific findings of fact and conclusions of law. It is appropriate, therefore, that this petition for certiorari be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A

SUPREME COURT OF KENTUCKY

85-SC-566-MR

PARRAMORE LEE SANBORN - - - - *Appellant*

v.

COMMONWEALTH OF KENTUCKY - - - *Appellee*

Appeal from Henry Circuit Court
No. 83-CR-057
Honorable Dennis A. Fritz, Judge

OPINION AND ORDER

On August 30, 1985, this Court entered an order in the above-styled action granting appellant's motion for an extension of time to June 2, 1986, in which to file his brief and perfect the appeal.

In the same Order we further provided:

> "If appellant's brief is not filed and his appeal is not perfected on or before June 2, 1986, appellant's counsel, Honorable J. Vincent Aprile, II, and Honorable Julie Namkin, shall appear before this Court on June 24, 1986, at 11:00 a.m., in order to show cause why they should not be held in contempt of this Court or sanctioned, for failure to timely complete the brief."

Appellant's counsel, J. Vincent Aprile, II and Julie Namkin, failed to comply with this Order and a hearing was held on June 24, 1986, at which time Mr. Aprile and Ms. Namkin appeared and offered explanation.

We find the following facts to be true:

The transcript of evidence was filed on June 27, 1985. Thereafter, *on the day the brief was due* appellant failed to file his brief but instead filed a motion for a ten (10) month extension. The reasons for the requested lengthy extension included a recitation of the length of the record on appeal and counsel's present caseloads, along with counsel's estimate, after reviewing the record and based on their present caseloads and past experience with appeals of comparable nature and size, that an additional ten (10) months would be needed to prepare appellant's brief. In paragraph ten of the motion for extension counsel stated that "(b)ecause this is a capital case in which the death sentence was imposed, the undersigned counsel believe this initial extension of ten (10) months is both reasonable and necessary under the circumstances." On August 30, 1985, this Court considered and granted appellant's requested motion for extension of time and entered the aforementioned order.

Ten months later, *on the date the brief was due,* appellant failed to file his brief but instead filed a motion requesting another ten (10) month extension of time. Counsel failed to comply with this Court's order of August 30, 1985, to timely file appellant's brief and instead filed a second motion for extension of time which parroted in large part the language of the previous motion for extension of time and listed "the unusual length of the record, the large number of preserved errors to be evaluated and the imposition of the sentence of death" as reasons justifying counsels request for an additional extension of time.

Counsel Namkin filed an ex parte motion to be relieved from appearing at the June 24, 1986 show cause hearing in which she detailed her current caseload. This Court denied the motion on June 23, 1986.

At the oral hearing conducted June 24, 1986, Mr. Aprile advised this Court that he had not completed reading the record in this case, nor begun writing the brief and that the initial request for an extension of time was merely an estimate of the time needed to complete the brief. Ms. Namkin advised the Court that, unlike Counsel Aprile, she had read the record but that she too had not begun writing appellant's brief. After ten-months' extension of time and in spite of a pending show cause order, neither attorney had begun writing appellant's brief, and one had completed reading the record.

Among this Court's responsibilities is the duty to protect the authority of the judiciary and to respect the rights of defendants charged with committing crimes. This Court may not dismiss an appeal for counsel's failure to timely file a statement of appeal and brief. However, this Court cannot tolerate interminable delays occasioned by counsel deciding when it is timely and appropriate for a brief to be filed, rather than following the dictates of this Court.

Mr. Aprile and Ms. Namkin gave no adequate response to the Order of this Court to show cause. After eleven months neither counsel has committed any portion of the appellant's brief to writing and Mr. Aprile has failed to read the record in its entirety. Although counsel were fully aware that they would be unable to comply with this Court's order of August 20, 1985 and timely file appellant's brief, they waited until the last day of the ten-month extension period to request another extension. Mr. Aprile advised the Court that Ms. Namkin had proposed filing the motion for extension at an earlier date, but that as senior counsel he elected to file the motion on the date the brief was due to be filed. Counsel were granted a realistic deadline for filing appellant's brief and could not justify the practice prevalent in criminal cases of routinely seeking an additional extension of time on the last day of the extension

period rather than filing the brief. When counsel is granted a lengthy extension of time in which to file a brief and it becomes impossible for counsel to file that brief, counsel shall inform this Court and request an additional extension at the earliest practicable date, justifying their inability to file the brief and the necessity for an additional extension of time to complete the brief.

We find no acceptable excuse for counsel's failure to even begin writing appellant's brief before the date the brief was ordered to be filed. We further find that Mr. Aprile and Ms. Namkin are in contempt of the Order of this Court entered August 30, 1985, requiring them to file appellant's brief on or before June 2, 1986, or appear to show cause why they should not be held in comtempt of this Court or sanctioned for failure to timely complete the brief. We find counsel's explanations as to caseload to be inadequate to explain their lack of effort to commit any portion of appellant's brief to writing. We find no merit in counsel's argument that both attorneys must read the record on appeal in its entirety before beginning work on appellant's brief. We find no explanation for failing to notify us immediately if there were considerations that would legitimately have prevented their compliance with our Order of August 30, 1985, when notified thereof.

Being duly advised, it is the order of this Court that said J. Vincent Aprile, II, as senior counsel of record, is found in contempt of court and fined $500 for his contempt. It is further the order of this Court that said Julie Namkin, as junior counsel of record, is found in contempt of court and fined $250 for her contempt.

In consideration of this being the first conviction, payment of both fines is suspended subject to further conduct. Costs of this proceeding are assessed against Mr. Aprile and Ms. Namkin.

All sitting.

Stephens, C.J., and Leibson, Stephenson, Vance, and Wintersheimer, J.J., concurring.

Gant, J., dissents in a separate dissenting opinion and is joined by White, J.

ENTERED: August 7, 1986.

/s/ Robert F. Stephens
Chief Justice

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SUPREME COURT OF KENTUCKY

85-SC-566-MR

PARRAMORE LEE SANBORN - - - - *Appellant*

v.

COMMONWEALTH OF KENTUCKY - - - *Appellee*

Appeal from Henry Circuit Court
No. 83-CR-057
Honorable Dennis A. Fritz, Judge

DISSENTING OPINION BY JUSTICE GANT

In my opinion, there was more than an adequate showing of cause for failure to file the briefs herein in the allotted time period.

A history of the practice of motions for extension of time is in order at this juncture. The revival of the death penalty in Kentucky occasioned a tremendous responsibility in the Office of Public Advocacy, but did not occasion a comparable increase in staff. The result was a flood of motions to this court for short extension of 60 to 90 days. After conference between the OPA and this court, it was determined that under no circumstances should a fixed period of extension be requested until the record had been examined and an estimate of required time had been made. This came as a result of repeated instances where extensions had been moved for without even a reference to the record.

No express policy was formulated concerning death penalty cases except that this court consistently granted

and conceded that length requirements would be waived. However, at no interval was the Public Advocate informed that the initial extension would be a final one in death penalty cases, irrespective of length of record, number of exhibits, number of potential errors, etc.

The ability to schedule time by a private practitioner and a public officer is vastly different. For example, in the instant case, both attorneys completed and filed briefs in another death penalty case. One attorney who had originally been assigned the case left the employment of the OPA, causing Julie Namkin to be switched from another case. Mr. Aprile had to replace another resigning attorney at a capital offense trial in Christian County. The public defender has no control over his case load, the gravity of his cases, or the number of attorneys available for assignment, and is unable to refuse to accept one case while another is pending. Often, the attorney assigned the appeal was not involved at trial.

To expect absolute accuracy in estimating the preparation time for a case of this magnitude upon a 30-day examination of thousands of pages of transcript is patently unfair when the circumstances of underpaid, highly motivated public attorneys are considered. Cause for delay was clearly shown. There was absolutely no contempt of the order of this court when it was apparent that both these attorneys had done all within their power. To punish them for waiting until the last day is a new concept in law. There has been no harm done and no malice shown. The show cause order should never had been made a part of the original extension but used only if additional time was requested. White, J., joins in this dissent.

APPENDIX B

SUPREME COURT OF KENTUCKY

85-SC-566-MR

PARRAMORE LEE SANBORN - - - - *Appellant*

v.

COMMONWEALTH OF KENTUCKY - - - *Appellee*

Appeal from Henry Circuit Court
No. 83-CR-057
Honorable Dennis A. Fritz, Judge

ORDER DENYING MOTION FOR RECONSIDERATION
ORDER MODIFYING OPINION

Appellant's motion for reconsideration is denied and the opinion and order rendered by this court on August 7, 1986, is modified on its face.

ENTERED: September 25, 1986.

/s/ Robert Stephens
Chief Justice

All sitting.

Stephens, C.J., and Leibson, Stephenson and Wintersheimer, J.J., concurring. Vance, J., would impose sanctions, but without a finding of contempt. Gant, J., dissents in a separate dissenting opinion and is joined by White, J.

ENTERED: August 7, 1986.

/s/ Robert F. Stephens
Chief Justice

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APPENDIX C

SUPREME COURT OF KENTUCKY

85-SC-566-MR

PARRAMORE LEE SANBORN - - - - *Appellant*

v.

COMMONWEALTH OF KENTUCKY - - - *Appellee*

Appeal from Henry Circuit Court
No. 83-CR-057
Honorable Dennis A. Fritz, Judge

ORDER

The motion of Honorable J. Vincent Aprile, II, and Honorable Julie Namkin to vacate the finding of contempt of court contained in this Court's Opinion and Order entered August 7, 1986 and modified by this Court's Order entered September 25, 1986, is denied.

Stephens, C.J., and Gant, Stephenson, Vance, White and Wintersheimer, J.J., sitting. All concur.

Leibson, J. not sitting.

ENTERED: October 31, 1986.

/s/ Robert F. Stephens
Chief Justice